LE COPY

Office-Supreme Court, U.S.
FILED
FEB 24 1960
JAMES R. BROWNING, Clerk

No. 637

# In the Supreme Court of the United States

OCTOBER TERM, 1959

---

DOSKIN PRODUCER, INC. AND KEVA GAS & OIL COMPANY, PETITIONERS

v.

WILLIAM B. PETTIT AND THOMAS J. CRAWFORD, TRUSTEES OF SWAN-FINCH OIL CORPORATION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION**

---

J. LEE RANKIN,
*Solicitor General,*
*Department of Justice, Washington 25, D.C.*

THOMAS G. MEEKER,
*General Counsel,*
DAVID FERBER,
*Assistant General Counsel,*
RICHARD V. BANDLER,
*Special Counsel,*
KIVA SEARLE,
*Attorney,*
*Securities and Exchange Commission,*
*Washington 25, D.C.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 9 |


## CITATIONS


Cases:

*Aberly* v. *Craven County*, 70 F. 2d 52 ..... 6

*Alaska Industrial Board* v. *Chugach Electric Assn.*, 356 U.S. 320 ..... 8

*Cline* v. *Kaplan*, 323 U.S. 97 ..... 8

*Langnes* v. *Green*, 282 U.S. 531 ..... 6

*Le Tulle* v. *Scofield*, 308 U.S. 415 ..... 8

*Peoria & P.U. Ry. Co.* v. *United States*, 263 U.S. 528 ..... 7, 8

*Schwartz, In re*, 89 F. 2d 172 ..... 6

*United States* v. *American Railway Express Company*, 265 U.S. 425 ..... 5

*Williams* v. *Bank of America Nat. Ass.*, 55 F. 2d 884 ..... 6

Statutes:

Bankruptcy Act, 30 Stat. 544, as amended, 11 U.S.C. 1 *et seq.*:

Section 2a ..... 10

Section 24 ..... 10

Section 25a ..... 11

Section 208 ..... 1

Miscellaneous: Page
Fed. R. Civ. P. Rule 81(a)(1) ..... 5
General Orders in Bankruptcy:
Order 36 ..... 5
Order 37 ..... 5

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 637

DOESKIN PRODUCTS, INC. AND KETA GAS & OIL COMPANY, PETITIONERS

*v.*

WILLIAM D. PETTIT AND THOMAS J. CRAWFORD, TRUSTEES OF SWAN-FINCH OIL CORPORATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION[1]

### OPINIONS BELOW

The opinions of the Court of Appeals (Pet. 34–46, 48–49) are reported at 270 F. 2d 95 and 699. There is no reported opinion of the District Court. Its Findings of Fact, Conclusions of Law and Opinion are set forth at R. 113a–127a.[2]

### JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1959 (Pet. 47). A petition for rehear-

[1] The Securities and Exchange Commission is a party to the proceeding in the District Court pursuant to Section 208 of the Bankruptcy Act, 11 U.S.C. 608.

[2] "R. ——" refers to the appendix of the appellants in the court below.

ing was denied on October 13, 1959 (Pet. 50). The petition for a writ of certiorari was filed on January 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a respondent in a summary proceeding instituted by trustees appointed under Chapter X of the Bankruptcy Act, without appealing from a ruling denying his contention that a plenary suit was required, may contest the propriety of the summary proceeding on an appeal by the trustees in which the respondent supports the bankruptcy court's determination on the merits.

## STATUTE INVOLVED

Pertinent provisions of the Bankruptcy Act, 30 Stat. 544, as amended, 11 U.S.C. 1, *et seq.* are set forth in the Appendix, *infra*, pp. 10–11.

## STATEMENT

This petition arises out of a proceeding under Chapter X of the Bankruptcy Act, 52 Stat. 883, as amended, 11 U.S.C. 501, *et seq.*, for the reorganization of the Swan-Finch Oil Corporation (the "debtor").

Petitioners do not contest the facts, as set forth by the court below (Pet. 6). On December 31, 1956, the capital stock of petitioner Keta Gas & Oil Company ("Keta"), all of which was owned by the debtor, came into the possession of petitioner Doeskin Products, Inc. ("Doeskin"), purportedly pursuant to an agreement dated October 5, 1956, with the debtor's subsidiary, Swan-Finch Gas Development Company, for a consideration of 700,000 shares of Doeskin's com-

mon stock. This transaction was engineered by one Lowell Birrell, who then controlled both Doeskin and the debtor. Subsequently, Birrell fled to Cuba and a new board of directors of the debtor was elected; the debtor then filed a petition under Chapter X, which was approved by the District Court, and trustees of the debtor were appointed.

The trustees instituted a summary proceeding in the bankruptcy court for an order directing Doeskin to turn over the Keta stock to them (R. 33a–35a, 31a–32a). Petitioners moved to dismiss on the grounds (1) that the bankruptcy court lacked jurisdiction over the subject matter because Doeskin had a substantial adverse claim to the stock and (2) the court did not have personal jurisdiction over Keta (R. 36a–42a). Petitioners also filed an answer asking dismissal of the trustees' proceeding, in which they renewed their objections to jurisdiction and averred also that the trustees had failed to state a cause of action (R. 43a–46a). The bankruptcy court in effect deferred action upon the motion to dismiss pending a hearing on the trustees' application and the petitioners' answer. At the hearing, petitioners renewed their motion to dismiss. On the basis of detailed findings of fact and conclusions of law, the court overruled petitioners' objection to jurisdiction but at the same time found in petitioners' favor on the merits. The court concluded that the trustees were not entitled to the Keta stock unless the consideration paid by petitioner could and should be restored. It being evident that the *status quo ante* could not be effected, the

court dismissed the trustees' petition (R. 123a–124a, 128a–129a).

An appeal was taken by the trustees. Petitioners filed no cross-appeal. They urged affirmance of the lower court's ruling on the merits, stating that, "[a]s appellees," they did "not * * * urge that the Court below did not have summary jurisdiction" and that they "accepted and * * * [were] bound by the ruling of the Court below, that it had summary jurisdiction of the matter." They nevertheless urged that they had "not waived their right, if need be, to maintain their position disputing the jurisdiction exercised by the Court" and "as a caution" they submitted that "should reversal or substantial modification be indicated * * *, a plenary action should be required instead of the * * * [summary] proceeding."[3]

The Court of Appeals reversed, disagreeing with the District Court that New York law required restoration of the consideration, and holding that the trustees were entitled to the Keta stock without more. Judge Hand, dissenting, would have made the granting of the trustees' petition conditional upon restoration of what the lower court might find to be "the nearest equivalent to cancellation of the Doeskin shares" (Pet. 46).

After reversal by the Court of Appeals, petitioners sought rehearing, asking for affirmance or modification of the District Court's order "so as to relegate the trustees to a plenary suit for the relief which they seek." It is to review the denial of the rehearing

---

[3] Brief for appellees, *In the Matter of Swan-Finch Oil Corporation* (C.A. 2, No. 244, Oct. Term 1958) p. 33.

petition by a unanimous court that petitioners seek a writ of certiorari.

**ARGUMENT**

The question petitioners seek to review has long been settled for circumstances such as those presented here, and was properly decided below.[4]

Where a party seeks substantially to modify or to reverse a dispositive ruling of a trial court, he must take an appeal and may not rely upon an appeal taken by his opponent. Petitioners confuse this principle, which is applicable here, with the principle that in support of a judgment any matter appearing in the record may be urged, even though it may involve an attack upon the reasoning of the lower court. They quote language to the latter effect from *United States* v. *American Railway Express Company*, 265 U.S. 425, 435 (Pet. 14), without noting that that language is preceded by the statement:

> * * * It is true that a party who does not appeal from a final decree of the trial court can-

[4] Petitioners do not seek review in this Court of the legal determination of the court below that, on the facts of record, the debtor is entitled to the return of its property. Nor do they explicitly seek review of the propriety of the summary proceeding in the bankruptcy court, as distinguished from the determination as to the waiver of petitioners' contentions with respect thereto (Pet. 2). As the court below indicated in its denial of the petition for rehearing (Pet. 49), it had "assumed" the propriety of the summary proceeding and apparently had not specifically considered it. In view of petitioners' implications as to an alleged lack of procedural due process (Pet. 6, 9, 10, 11, 15 and 16), however, we note that the Rules of Civil Procedure for District Courts are applicable in proceedings in the bankruptcy court and on appeals therefrom. Rule 81a(1); General Orders in Bankruptcy, 36 and 37.

> not be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. * * * .

In that case an appeal had been taken from an injunction issued against certain railway companies and the narrow issue presented and decided by this Court related to the propriety of appellees' seeking to uphold the injunction on grounds not accepted by the lower court. It did not involve the right of an appellee to reverse a ruling adverse to it or to modify such ruling substantially—so as to accord the appellee further or different relief from that given by the trial court—in the absence of an appeal by such appellee.[5]

Here, the success of petitioners' jurisdictional argument would necessarily have resulted in a material modification of the decree below. The trial court did not dismiss the trustees' petition on the ground that the trustees could have the issues determined only in a plenary suit, as urged by petitioner, but rather on the merits of the controversy. Petitioners' argument

---

[5] Nor is there help for petitioners in *Langnes* v. *Green*, 282 U.S. 531; *In re Schwartz*, 89 F. 2d 172 (C.A. 2); *Aberly* v. *Craven County*, 70 F. 2d 52 (C.A. 4); or *Williams* v. *Bank of America Nat. Ass.*, 55 F. 2d 884 (C.A. 2), cases cited at Pet. 14–15. In those cases, the appellees sought to sustain the orders of the lower court; although they relied on grounds other than those constituting the bases for the decisions, they in no way attempted to change the effect of the orders appealed from or to obtain different relief.

(Pet. 13–14) that it was not aggrieved since it was seeking to maintain the lower court's ruling, *i.e.*, dismissal of the trustees' petition, does not accurately state the true issue presented by this case. The lower court's "dismissal" on the merits, if sustained, would have left the trustees with no further remedy; "dismissal" on jurisdictional grounds, as urged by petitioners, if sustained, would not have terminated the contest but rather would have relegated the trustees to a plenary lawsuit—a remedy which would still be open to them. In other words, by their jurisdictional argument in the Court of Appeals petitioners were not seeking to sustain the trial court's judgment but rather to modify or qualify it materially.

Petitioners, having elected to accept the results of the procedure followed by the bankruptcy court (see *supra*, p. 4), were foreclosed from challenging that procedure. Their attempt to accept the procedure only insofar as its result pleased them is what the court below, in denying rehearing, characterized as playing "fast and loose," observing that if petitioners "meant to raise the point that the District Court was wrong to deny their cross-motion, they should have appealed from the order which denied it * * *" (Pet. 49). In this respect, petitioners' situation is comparable to that of the United States in *Peoria & P. U. Ry. Co.* v. *United States*, 263 U.S. 528. There, although the United States had not waived its objection to venue, it did not appeal when the District Court denied an injunction against it on the merits. It was held that "by failure to enter cross appeal from the court's action in overruling its objection, the right

to insist upon it [on the appeal] was lost." 263 U.S. at 536.[6] See also *Alaska Industrial Board* v. *Chugach Electric Assoc.*, 356 U.S. 320, 324–325; *LeTulle* v. *Scofield*, 308 U.S. 415, 421–422.

Petitioners' reliance on *Cline* v. *Kaplan*, 323 U.S. 97, is misplaced. The issue there was whether an objection to the summary jurisdiction of the bankruptcy court had been timely made by appellant. This Court found that appropriate objection had been taken to the exercise of such jurisdiction in the lower court and that it had not been waived for the purpose of an appeal by the aggrieved party. The only similarity is that in both cases summary jurisdiction had been exercised by the District Court. In *Cline*, however, the merits had been determined against the objector, and he had appealed, consistently, from both determinations. The contention of petitioners' here, if sus-

---

[6] Petitioners argue that there was no adverse order from which they might have appealed (Pet. 14–16). But examination of the record in this Court in the *Peoria* case shows a similar situation. The venue determination of the district court in that case was set forth in its opinion (No. 318, Oct. Term, 1923, R. 100), but its order merely stated (*Id.* at R. 102):

> This cause came on to be heard on February 10, A.D. 1923, on the motion of plaintiff for a temporary injunction, and the said motion having been argued by counsel and the Court having taken the said motion under consideration until this day and the court being advised in the premises, it is ordered that the motion be, and the same is hereby denied.

Comparably, in the instant case, where the determination as to summary jurisdiction was not explicitly set forth in the order, the district court determined as a Conclusion of Law that it had "jurisdiction of the parties and of the subject matter of the proceeding" (R. 122). As the Court of Appeals held (Pet. 48–49), that was a sufficient disposition of petitioners' jurisdictional contention.

tained, would mean that an "aggrieved party" under Section 25 of the Bankruptcy Act (11 U.S.C. 48) would include a litigant who considers himself aggrieved by the judgment of the appellate court, rather than by the judgment of the bankruptcy court as provided by Section 24(a) of the Act (11 U.S.C. 47).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

THOMAS G. MEEKER,
*General Counsel,*
DAVID FERBER,
*Assistant General Counsel,*
RICHARD V. BANDLER,
*Special Counsel,*
KIVA BERKE,
*Attorney,*
*Securities and Exchange Commission.*

FEBRUARY 1960.

## APPENDIX.

### Pertinent Provisions of the Bankruptcy Act

Section 2(a), 30 Stat. 545, as amended, 11 U.S.C. 11(a):

> The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, * * * to—
>
> * * * * * *
>
> (7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, * * * and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;
>
> * * * * * *

Section 24, 30 Stat. 553, as amended, 11 U.S.C. 47:

> (a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy

in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: * * *

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

* * * * *

Section 25(a), 30 Stat. 553, as amended, 11 U.S.C. 48(a):

Appeals under this Act to the United States courts of appeals shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry.

U.S. GOVERNMENT PRINTING OFFICE 1960